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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1199

R. N. BROWN and ERMA JEAN BROWN,
Petitioners,

vs.

WARREN E. WOODS, Circuit Judge, Pulaski County, Arkansas and HAROLD CHAKALES, M.D.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Arkansas

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To the Supreme Court of the State of Arkansas

TO THE HONORABLE THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, R. N. Brown and Erma Jean Brown, pray that a writ of certiorari be issued to the Supreme Court of Arkansas to review its judgment entered November 14, 1974, wherein the Arkansas Supreme Court upheld the Trial Judge's denial of petitioners' right to be effectively represented by coun-

sel of their choice in a civil case pending in a state court in Arkansas.

A Petition for Rehearing was denied by the Supreme Court of Arkansas on December 23, 1974.

OPINIONS BELOW

The majority opinion of the four Justices of the Supreme Court of Arkansas is reported at — Ark. —, 516 S.W.2d 98 (1974). The dissenting opinion of three Justices of the Supreme Court of Arkansas is reported at 516 S.W.2d 102 (1974). No opinion was delivered by the Supreme Court of Arkansas in denying Petition for Rehearing, but the order denying said Petition reflects the opinion of one Justice that the Petition should have been granted.

JURISDICTION

1. The opinion and order of the Supreme Court of Arkansas was entered November 18, 1974. (Appendix A, page A-1)

2. The order denying petitioners timely Petition for Rehearing was entered December 23, 1974.

3. The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C.A. § 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the four member majority opinion of the Arkansas Supreme Court operates to abridge the petitioners' right to effectively assert their legal rights by effective counsel of their choice where the non-resident attorney employed by petitioners

has unquestioned ethical qualifications and professional competency in an area of specialization, where the subject matter of the litigation for which the non-resident attorney is employed is of a specialized character, where the availability of effective local counsel to represent the petitioners is clearly shown to be unknown to petitioners, where the non-resident attorney associates with local counsel and where no legitimate state interest which the Arkansas Supreme Court seeks to protect shall be jeopardized by enrolling the non-resident attorney employed by these petitioners to represent them in this case?

2. Whether any rational basis exists to support the action of the Trial Judge in prohibiting the petitioners from being represented by James S. Cox, a non-resident attorney, where the interest of the State of Arkansas in regulating the practice of law is adequately protected by the association of James S. Cox with a local Arkansas counsel, in the absence of any such rational basis, petitioners being denied due process and equal protection of the law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section I of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the Constitution of the United States provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

The Arkansas Non-Resident Attorney's Statutes, Ark. Stats. Ann. §§ 25-108, et seq. (1955) are set out in pertinent part in Appendix E.

STATEMENT OF THE CASE

On June 15, 1971, Harold Chakalas, M.D., the defendant below, in treating the petitioner, Erma Jean Brown, for a minor injury she received to her neck, injected a hypodermic needle into the left side of her neck. Immediately upon and following the insertion of said hypodermic needle into the left side of her neck, Erma Jean Brown felt immediate paralysis, she could not breathe and she lapsed into unconsciousness. She has been and continues to be permanently disabled and triplegic.

Subsequent to June 15, 1971, the petitioners conferred with the Little Rock, Arkansas, law firm of McMath, Leatherman and Woods, regarding their causes of action against Harold Chakalas, M.D., After the firm had had the matter under consideration for a substantial period of time, the petitioners were advised by Henry Woods, a partner in the firm of McMath, Leatherman and Woods, and the then President of the Arkansas Bar Association, that his law firm decided not to represent the petitioners in their causes of action against Dr. Chakalas because of the firm's prior relationship with Dr. Chakalas. Henry Woods did specifically and expressly refer the petitioners to James S. Cox, a Memphis, Tennessee, lawyer who Mr. Woods recommended to the petitioners as being a competent lawyer to handle the petitioners' complicated medical malpractice case. Henry Woods, the then President of the Arkansas Bar Association personally called James S. Cox to request Mr. Cox to consider representing the petitioners.

Thereafter, the petitioners did confer with James S. Cox in Mr. Cox's Memphis, Tennessee, office. At the first meeting

between Mr. Cox and the petitioners, he disclosed that the case of *McKenzie v. Burris*, later reported in 255 Ark. 330, 500 S.W.2d 357 (1973), was pending in the Supreme Court of Arkansas. He advised the petitioners that the question before the Supreme Court of Arkansas in the *McKenzie* case was whether Mr. Cox would be allowed to represent litigants in association with local counsel in a medical malpractice case pending in the Circuit Court of Pope County, Arkansas. Cox advised the petitioners that he sincerely believed that the Arkansas Supreme Court would render a favorable opinion in the *McKenzie* case, but in respect to and so as not to be presumptuous of the Arkansas Supreme Court, Mr. Cox agreed to represent the petitioners conditioned upon said favorable ruling. Recognizing, however, that the statute of limitations would run within a few days to bar petitioners' cause of action, Mr. Cox prepared the complaint and personally delivered same to Alonzo D. Camp, a Little Rock, Arkansas, lawyer who had agreed to associate with Mr. Cox in this case conditioned upon a favorable ruling in *McKenzie v. Burris, supra.* Alonzo D. Camp signed the complaint as attorney for the petitioners and filed same in the Pulaski County, Arkansas, Circuit Court on June 12, 1973.

On October 22, 1973, the Supreme Court of Arkansas delivered its opinion in *McKenzie v. Burris, supra,* upholding the enrollment of James S. Cox as a non-resident attorney of law in the Circuit Court of Pope County, Arkansas. In so doing, the Arkansas Supreme Court specifically upheld the constitutionality of and the validity of the Arkansas Non-Resident Attorney's Statutes, Ark. Stats. Ann. §§25-108, et seq. (1955). Ark. Stats. Ann. §25-108 reads in pertinent part:

> "Non-resident attorneys of law of record shall be allowed to practice law in all courts of this State of equal jurisdiction with the court or courts to which they have been *admitted to practice and are members of the bar in*

good standing in the state of their residence, under such terms, conditions and requirements as may be prescribed by the rules of practice of any court in which any such non-resident attorney of law seeks to practice." *(Emphasis added).*

Ark. Stats. Ann. §25-109 (1911) reads in pertinent part:

> "when . . . enrolled (by the Clerk of the Court), said non-resident attorney at law shall be vested with all the rights and privileges of resident attorneys of law at said court, except that a non-resident attorney at law shall not be allowed to become a bondsman for a client in this state."

On October 23, 1973, James S. Cox by Alonzo D. Camp, the Little Rock, Arkansas, attorney filed a petition in the Circuit Court of Pulaski County, Arkansas, seeking to enroll James S. Cox as a non-resident attorney of record under the Arkansas Non-Resident Attorney's Statutes, Ark. Stats. Ann. §§ 25-108, et seq. (1955).

By order dated October 23, 1973, Warren Wood, Circuit Judge in Pulaski County, Arkansas, granted the said petition, which order reads in pertinent part:

> "It appearing to the satisfaction of the court that James S. Cox is a non-resident of the State of Arkansas, a member in good standing of the bar of the State of Tennessee, and has professional business in the Circuit Court of Pulaski County, Arkansas, in connection with the above styled case (Brown v. Chakalas), and should be enrolled as a non-resident attorney, said petition is hereby granted and the Clerk of this Court is hereby directed to enroll petitioner according to law."

On November 14, 1973, W. A. Eldredge, attorney at law, representing the defendant, Chakalas, signed and caused to be

filed a motion to strike court's order of October 23, 1973. W. A. Eldredge is the same attorney who represented the party seeking to prevent James S. Cox from representing the plaintiff in *McKenzie v. Burris, supra,* the real party defendant in interest in each of these cases being the Aetna Insurance Companies.

Relying on the *McKenzie v. Burris* decision, Alonzo D. Camp as attorney for petitioners responded to the defendant's motion to strike the October 23, 1973, order enrolling James S. Cox as a non-resident attorney and stated:

> "The Order of the Court herein dated October 23, 1973, enrolling the Hon. James S. Cox herein as a non-resident attorney was made and entered according to law.
>
> Wherefore, plaintiffs respectfully move the Court to deny defendant's Motion to Strike."

On January 11, 1974, the motion to strike the October 23, 1973, order enrolling James S. Cox was heard in chambers before the Honorable Circuit Judge of Pulaski County, Arkansas. Present at the hearing were Warren Wood, Circuit Judge and W. A. Eldredge, representing the defendant, the petitioner R. N. Brown, Alonzo D. Camp and James S. Cox. Transcription was made of the proceedings. No argument of counsel was made.

After receiving testimony of James S. Cox and of the petitioner R. N. Brown, the Honorable Warren Wood, Circuit Judge of Pulaski County, Arkansas, delivered a memorandum opinion dated January 14, 1974. Although the said memorandum opinion is reprinted in its entirety in Appendix C, specific reference is made to the following language contained therein:

> "IT HAS BEEN THE CUSTOM AND PRACTICE OF THIS COURT TO WELCOME NONRESIDENT ATTORNEYS TO BE ADMITTED FOR A PARTICULAR CASE."

Notwithstanding the stated custom and practice, the Trial Judge granted the defendant's motion to strike the October 23, 1973, order enrolling James S. Cox as non-resident attorney in the case below.

An Order Nunc Pro Tunc was entered as and for January 14, 1974, by Warren Wood, Circuit Judge, on February 26, 1974, specifically granting the defendant's motion to strike the order of October 23, 1973, enrolling James S. Cox as non-resident attorney of record.

Appeal of said Order being unavailable, petitioners filed their Petition for Writ of Certiorari and their Petition for Writ of Mandamus in the Supreme Court of Arkansas. Said petitions read in pertinent part as follows:

> "14. Petitioners would most respectfully state to this Honorable Court that *they are deeply hurt and aggrieved at the actions of the Honorable Warren E. Wood in preventing them from having counsel of their own choosing where no complaint is made as to his ethics, competency or qualifications.* Petitioners would further show that *they feel the Honorable Warren E. Wood has without any cause or reason denied them of their constitutional right to have counsel of their own choosing to represent them where such counsel is licensed to practice law.*
>
> 15. Petitioners would further show that they felt when they engaged the said James S. Cox that they had one of the most capable and most competent lawyers in the United States to handle their cause of action involving medical malpractice which they understand is the most complex and difficult type of litigation to be involved in.
>
> 16. Petitioners further aver that *they absolutely feel that they have the privilege to select any lawyer in the United States to represent them who they deem as the best*

for them in the prosecution of their litigation whether he resides in Arkansas or in Alaska, and that while they respect and will adhere to the authority of the Supreme Court of the State of Arkansas and the inferior courts in regulating the practice of law within the State of Arkansas in determining who may practice law and who may not, they do not believe that an inferior court within the State of Arkansas can arbitrarily and without any reason other than the fact that an attorney of their own choosing has participated in other cases in the State of Arkansas where no complaint of any kind was ever made and participated under the authority of the various other courts in the State of Arkansas be denied now of his services which they so desperately need.

17. Petitioners most respectfully submit to this Honorable Court that *the actions of the Honorable Warren E. Wood in depriving them of counsel of their choosing and as complained of herein were arbitrary, capricious,* a gross abuse of discretion *and a violation of their constitutional rights." (Emphasis added).*

In their Abstract and Brief submitted to the Supreme Court of Arkansas, petitioners specifically abstracted the federal questions as contained in said petition. Petitioners did heavily rely upon the rationale contained in the *McKenzie v. Burris,* as well as *Letaw v. Smith,* 223 Ark. 638, 268 S.W.2d 3 (1954) and the Arkansas Non-Resident Attorney's Statutes, Ark. Stats. Ann. § 25-108 et seq. (1955), for reversal of the action of the Trial Judge; but petitioners reasserted the federal questions in their brief in pertinent part as follows:

"In *McKenzie v. Burris, supra,* pages 345-346, this Court stated in pertinent part:

> It is only when there is no rational basis for denying the right or privilege to practice in a State or there

is arbitrary action or invidious discrimination by State officers excluding one from the practice that the 'due process' and 'equal protection' clauses of the 14th Amendment come into play.

These petitioners submit that no rational basis exists for denying James S. Cox the right or privilege to practice in the Circuit Court of Pulaski County, Arkansas. These petitioners further submit that the Honorable Court below arbitrarily prohibited James S. Cox from representing these petitioners in this case in that court. These petitioners submit that the action taken by the Circuit Court of Pulaski County in striking the October 23, 1973, order enrolling James S. Cox, pursuant to Ark. Stats. Ann. § 25-108 et seq., is an unreasonable exception to that court's stated custom and practice to welcome non-resident attorneys to be admitted for a particular case." (Petitioners' Abstract and Brief, pages 55-56)

"NOTE: *The Practice of Law by Out-of-State Attorneys*, 20 Vand. L. Rev. 1276 (1967); *Morris, State Borders Unnecessary Barriers to Effective Law Practice*, 53 ABAJ 530 (1967); *Development: Constitutional Right to Engage an Out-of-State Attorney*, 19 Stan. L. Rev., 856 (1957). There is no doubt that critical constitutional questions are raised where a resident is deprived of superior legal counsel as may be obtained outside his state. The problem becomes even more acute where the availability of local counsel to represent a resident is unknown to the resident. *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968)" (Petitioners' Abstract and Brief, page 61).

Pertinent portions of NOTE: *The Practice of Law by Out-of-State Attorneys*, 20 Vand. L. Rev. 1276 (1967) are included in Appendix F to further illustrate the petitioners' assertion of these federal questions.

In Respondents' Supplemental Abstract and Brief, respondents responded to the petitioners assertion that petitioners had a constitutionally protected right to select counsel of their choosing by stating in pertinent part at page 15 thereof as follows:

> There has been no suggestion by any reputable bench or bar committee to the effect that litigants have the right or should have the right to pick an attorney from anywhere in the country to represent them in the domestic forum. Such a rule or policy would foil any attempt to discipline members of the Bar which, apparently, is in such need if one believes all that is printed in the current press. Almost every day it is reported in the national and state press that another attorney has been convicted of some crime or has been charged with some improper conduct. If state lines are to disappear in the licensing of attorneys, how can the courts of a state enforce discipline of the lawyers who practice before them? . . .
>
> Does not Judge Wood have to take into consideration the possibility that Attorney Cox might not be able to appear at trial, might not be able to appear at pre-trial, might not be available for discipline in order to require him to answer interrogatories, might not be available to conduct a hearing on some motion, or might not be available when depositions were scheduled, any one of which would work a hardship on the Arkansas residents in whose case he was enrolled and on the other residents of Arkansas who have other cases pending in the same court which may be delayed?
>
> . . . If lawyers are to come from adjoining states to take away the business of Arkansas lawyers, then it will become more difficult for Arkansas lawyers to have a satisfactory standard of living which undoubtedly will result in some of them resorting to borderline ethics in order to earn a living."

By oral argument before the Supreme Court of the State of Arkansas, Oscar Fendler, attorney for petitioners in that court, specifically reasserted the petitioners' right under the due process clause and equal protection clause of the Fourteenth Amendment to select an attorney of their choosing whether licensed to practice in the State of Arkansas or otherwise, where the attorney selected by the petitioners is associated with Arkansas counsel, where the subject matter of the litigation is of a specialized character, where the non-resident attorney has unquestionably high ethical standards and professional competency and where the availability of local counsel to handle the petitioners' cause of action is clearly shown to be unknown to petitioners.

The Supreme Court of the State of Arkansas in a four to three decision delivered November 18, 1974, denied petitioners' writs and in so doing affirmed the action of the Circuit Judge in striking the October 23, 1973, order enrolling James S. Cox as non-resident attorney of record in this case. The majority opinion which is reprinted in Appendix A does not reflect any specific reference to the federal questions asserted by these petitioners. The dissenting opinion, however, states in pertinent part as follows:

> "Thus, in view of past history, it appears to me that the trial court was arbitrary in refusing to permit Mr. Cox by comity from participating in the trial of this litigation . . .
>
> It also appears to me that by preventing Mr. Cox from representing Mr. and Mrs. Brown in this malpractice action we are encouraging the trial courts to give more emphasis to the income protection of local lawyers than we are to the rights of the litigants . . . After all, it would appear that the regulation of the practice of the law is for the benefit of the litigants not necessarily for the lawyers. If the regulation turns out in practice to be for only the benefit

of the lawyers, then we are subject to being chastised for operating a monopoly."

Petitioners timely filed their Petition for Rehearing and specifically reasserted the federal rights, as afforded by the Fourteenth Amendment to the Constitution of the United States.

An order denying petitioners' Petition for Rehearing was entered on December 23, 1974, which order reflects that Justice Byrd would have granted the Petition for Rehearing.

REASONS FOR GRANTING WRIT

I. Petitioners' Right to Effectively Assert Their Legal Rights by Counsel of Their Choice Is Severely Abridged by the Action Taken by the Trial Judge Below in Prohibiting James S. Cox From Representing Them, Which Action Was Upheld by the Four Member Majority of the Arkansas Supreme Court.

The question of an individual litigant's right to assert his legal rights by effective counsel of his choice in a civil action pending in a state court has not heretofore been squarely presented to this court. This court has, however, specifically recognized that a defendant in a criminal case has the constitutionally protected right to be represented by counsel of his choice. *Chandler v. Fretag*, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158. In *Chandler v. Fretag, supra*, this court stated in pertinent part:

> "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."

Other dictum contained in *Chandler, supra*, appears to reflect this court's further recognition that a litigant in a civil matter in a state court has the right to be represented by counsel:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and, therefore, of due process in the constitutional sense." 348 U.S. at 10.

This court has also specifically recognized that a group can unite to employ an effective counsel to assert their legal rights or the legal rights of its members. *N.A.A.C.P. v. Button*, 371

U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S. Ct. 1113, 12 L.Ed.2d 89 (1964); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971). In *United Transportation Union v. Michigan*, *supra*, this court stated in pertinent part:

> "The Michigan Supreme Court failed to follow our decisions in *Trainmen, United Mine Workers* and *N.A.A.C.P. v. Button*, . . . upholding the First Amendment principle that groups can unite to assert their legal rights as effectively and economically as practicable."

Petitioners submit that they have the constitutionally protected right to be effectively represented by counsel of their choice in the assertion of their legal rights in a civil case.

Effective representation of the petitioners in the case below consists of trial competency, knowledge of legal principles and medical facts and knowledge as to the availability of expert testimony, which is critical to this case. This Court should observe that a "conspiracy of silence" prevails in the medical profession respecting medical malpractice claims.

The four member majority opinion not only operates to deprive petitioners of the representation of James S. Cox in whom they have immense confidence, but also operates to force petitioners to select local counsel in whom petitioners may not have confidence and who may not be qualified to offer effective representation.

Before conferring with Mr. Cox, petitioners did attempt to employ Arkansas counsel to represent them. The Arkansas counsel elected not to represent petitioners. The President of the Arkansas Bar Association specifically referred petitioners

to James S. Cox of Memphis, Tennessee. This Court should observe that from the viewpoint of these petitioners, the availability of local counsel to effectively represent their interests is highly questionable when the President of the Arkansas Bar Association refers them to a non-resident attorney.

These petitioners have never been advised that effective local counsel is available to represent their interests in this highly complex, critical medical malpractice case except by the attorney representing the Aetna Insurance Companies.

Moreover, the Honorable Circuit Judge of Pulaski County, Arkansas, now vested with the authority granted by the four member majority opinion of the Arkansas Supreme Court, may prohibit any competent non-resident attorney associated with local counsel from representing petitioners upon the Court's finding that the non-resident, by virtue of his successful law practice, is "too busy." In *N.A.A.C.P. v. Button, supra,* this Court stated in pertinent part:

> "The decisions of this court have consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedom . . . a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. See *Schware v. Board of Bar Examiners,* 353 U.S. 232, 1 L.Ed.2d 796, 77 S.Ct. 752, 64 A.L.R.2d 288; *Konigsberg v. State Bar,* 353 U.S. 252, 1 L.Ed.2d 810, 77 S.Ct. 722 . . . Later, in *Bates v. Little Rock,* 361 U.S. 516, 524, 4 L.Ed.2d 480, 80 S.Ct. 412, we said, 'where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' Most recently, in *Louisiana ex rel. Gremillion v. National Association for Advancement of Colored People,* 366 U.S. 293, 297, 6 L.Ed.2d 301, 305, 81

S.Ct. 1333, we reaffirmed this principle: '. . . regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.' "

The four member majority opinion of the Arkansas Supreme Court stated in pertinent part as follows:

> "In *McKenzie*, we mention certain areas where a court may exercise its discretionary authority in consideration pro hac vice admissions:
>
> > The state has legitimate interests to be weighed in considering pro hac vice admissions in order to maintain a high level of professional ethics, to assure a high quality of representation in the courts and to protect the economic interests of the regularly licensed resident attorneys of the state. In order to properly protect these interests and to expedite the administration of justice, the courts are concerned with the qualifications and conduct of counsel, their availability for service of papers and amenability to disciplinary proceedings. But these interests do not justify an arbitrary numerical limitation on the number of such appearances by an attorney in the state, where the non-resident attorney associated with resident counsel is not involved in a general practice of law, particularly where the non-resident practitioner has developed some degree of expertise i. the particular field of litigation in which he is engaged. (Citing cases.)"

Petitioner submits that the state interests mentioned by the Arkansas Supreme Court are not so compelling as to justify the action taken by the Trial Judge. In fact, enrollment of James S. Cox as attorney of record in the Circuit Court of Pulaski County, Arkansas, shall not infringe upon any legiti-

mate state interest which the Arkansas Supreme Court deems worthy of state protection: (1) The ethical standards by which James S. Cox practices law have never been questioned by any court anywhere; (2) The Arkansas Supreme Court specifically observes that James S. Cox "is acknowledged to possess an expertise" in the subject matter of the present lawsuit and is "a member in good standing of the Bar of Tennessee"; (3) James S. Cox associated with local Arkansas counsel who would be available for service of papers and amenable to disciplinary proceedings, if necessary. In the latter regard, note should be made of the fact that local Arkansas counsel was shown to be attorney of record, having signed the original complaint filed in the lower court.

Substantial means are available to the Honorable Trial Judge below and to the Arkansas Supreme Court to protect the interests which the Supreme Court of Arkansas has indicated are worthy of state protection without prohibiting these petitioners from being effectively represented by James S. Cox. To the extent that such means are available to the Trial Judge, the total prohibition against these petitioners being effectively represented by James S. Cox is "overboard". *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 3 L.Ed.2d 231 (1960). The Trial Judge could promulgate such reasonable rules to require that any non-resident attorney be associated with local counsel who would be responsible to the Trial Court for all purposes.

If this petition for writ of certiorari is not granted, the Honorable Circuit Judge of Pulaski County, Arkansas, upon motion of Aetna Insurance Companies, may, under the guise of mere labels, deprive the petitioners of representation of any competent non-resident attorney. *Brotherhood of Railroad Trainmen of Virginia, supra.* The four member majority opinion not only operates to deprive petitioners of representation of effective non-resident counsel, but also operates to force petitioners to select local counsel who may not be qualified to offer effective representation.

If this petition for writ of certiorari is not granted, the four member majority of the Arkansas Supreme Court may be used by other litigants in Arkansas Courts or litigants in other states as authority to allow lower courts to arbitrarily deprive adversaries from being represented by effective counsel.

II. No Rational or Reasonable Basis Exists to Support the Action of the Honorable Trial Judge in Striking the October 23, 1973, Order Enrolling James S. Cox Pursuant to the Arkansas Non-Resident Attorney's Statutes.

In *Chandler v. Fretag*, this court quoted the following language from *Powell v. Alabama, supra*, with emphasis:

> *"If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and, therefore, of due process in the constitutional sense."*

See aiso *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957); and Ex Parte Garland (US) 4 Wall 333, 18 L.Ed. 366.

Petitioners submit that the Trial Judge acted arbitrarily in refusing to allow petitioners to be represented by James S. Cox in association with local counsel. The action taken by the Circuit Court of Pulaski County, Arkansas, in striking the October 23, 1973, order enrolling James S. Cox pursuant to the Arkansas Non-Resident Attorney's Statutes, is an unreasonable exception to that court's stated custom and practice to welcome non-resident attorneys for a particular case. Petitioners submit that no rational or reasonable basis exists to support the action of the Trial Judge in prohibiting petitioners to be represented by James S. Cox.

Certainly the ethical standards by which James S. Cox practices law have never been a question before any court in Arkansas, or elsewhere. James S. Cox enjoys a superior reputation in the medico-legal, as well as other fields of law. His expertise has developed through concentrated study and tireless effort. The Court below reflected its approval of the qualifications of James S. Cox in the October 23, 1973, order enrolling James S. Cox as non-resident attorney pursuant to Ark. Stats. Ann. §25-108.

That James S. Cox has served the best interests of petitioners is clearly supported in the record. James S. Cox did for these petitioners what local counsel could not or preferred not to do, to-wit: James S. Cox agreed to represent these petitioners in a complicated medical malpractice case. This Honorable Court should observe that the highly reputable Little Rock law firm of McMath, Leatherman and Woods declined to represent these petitioners. Henry Woods, the then President of the Arkansas Bar Association referred these petitioners to James S. Cox.

Moreover, had James S. Cox not agreed to represent these petitioners and had James S. Cox not prepared and personally delivered the complaint for filing, these petitioners' causes of action might have been forever barred by the statute of limitations.

The Arkansas Supreme Court adopted the Code of Professional Responsibility of the American Bar Association as a standard of professionaol conduct of attorneys at law on November 15, 1971. Canon 2 reads as follows:

> "A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE."

James S. Cox fully complied with the spirit of Canon 2 in agreeing to represent these petitioners in this medical malpractice case when an imminent danger that these petitioners' causes of action would soon be forever barred, and the availability of

skilled, competent local counsel was not known to the petitioners.

The Arkansas Supreme Court specifically observed that James S. Cox "is acknowledged to possess an expertise" in the subject matter of the present lawsuit and is "a member in good standing in the Bar of Tennessee".

James S. Cox had associated with local Arkansas counsel who would be available for service of papers and amenable to the disciplinary proceedings, if necessary. Accordingly, the Trial Court had no reason for concern respecting the availability of attorneys of record.

The Honorable Trial Judge had an established custom and practice of allowing non-resident attorneys to practice in his Court in a particular case. The action taken by the Trial Judge in prohibiting James S. Cox from representing the petitioners is completely inconsistent with the Court's stated custom and practice. Petitioners could not have fairly anticipated that the Trial Judge would arbitrarily make such an exception to his stated custom and practice. Moreover, petitioners could not have fairly anticipated that the Trial Judge would arbitrarily act contrary to the Arkansas Non-Resident Attorney's Statutes which had been recognized as the law in Arkansas since 1911, in the absence of any rule of the Arkansas Supreme Court to the contrary. The action of the Trial Judge in prohibiting James S. Cox from representing these petitioners is arbitrary, capricious and unreasonable. The Trial Court's arbitrary action deprived petitioners of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Petitioners respectfully submit that in the event this Petition for Writ of Certiorari is not granted, the Honorable Trial Judge below may prohibit any non-resident attorney from representing these petitioners upon grounds which are just as arbitrary and

unreasonable as those upon which the Trial Judge prohibited James S. Cox from representing these petitioners.

It is noteworthy that the only interest which stands to be protected by prohibiting James S. Cox from representing petitioners will be the interest of the insurance company who insured the physician defendant. As long as Aetna Insurance Companies are to be represented by highly skilled and effective defense lawyers while the petitioners are deprived of effective representation under the authority of the four member majority opinion of the Arkansas Supreme Court, petitioners are deprived of equal protection of the law as guaranteed by the Fourteenth Amendent to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgments and opinions of the Supreme Court of the State of Arkansas.

Respectfully submitted

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APPENDIX

APPENDIX A

Supreme Court of Arkansas

No. 74-36

R. N. Brown, et ux,
Petitioners,
v.
Warren E. Wood, Judge, et al.,
Respondents.

Opinion Delivered November 18, 1974
Petition for Writ of Certiorari and Writ of Mandamus to Pulaski Circuit Court, Warren E. Wood, Judge.
Writs Denied.

Frank Holt, Associate Justice

A nonresident attorney, James S. Cox, was enrolled by the Pulaski County Circuit Court in an ex parte proceeding permitting him to appear there as an attorney of record for petitioners in the case entitled R. N. Brown, et ux v. Harold Chakalas, M.D. The trial court granted defendant's subsequent motion to strike the previous order of enrollment. By a petition for certiorari and mandamus, the petitioners now seek an order reinstating Cox to his former status in the case. This method of appellate review is not in issue. Petitioners first assert that the trial court acted beyond its scope of authority in striking its previous order of enrollment which was pursuant to Ark. Stat. Ann. § 25-108 (Repl. 1962). We find no merit in this contention.

The statute reads:

> Nonresident attorneys at law of record shall be allowed to practice law in all the courts of this state of equal

> jurisdiction of the court or courts to which they have been admitted to practice and are members of the bar in good standing in the state of their residence, *under such terms and conditions and requirements as may be prescribed by the rules of practice of any court in which any such non-resident attorney at law seeks to practice.* (Emphasis ours.)

Petitioners argue that after a nonresident attorney demonstrates that he is admitted to practice in a court of equal jurisdiction and is a member of the bar in good standing in the state of residence, as here, the court must enroll the attorney after compliance with any reasonable rules and regulations prescribed by the enrolling court. In support of this argument the petitioners cite Ark. Stat. Ann. § 25-111 (Repl. 1962) which reads in pertinent part:

> A nonresident attorney at law, enrolled under this act (§§ 25-108-25-111), shall be and remain a member of the bar of the court in which he has been enrolled and shall not again be required to be enrolled in the same court, . . .

This evinces the legislative intent, say petitioners, that the practice of law in Arkansas by nonresident attorneys, once enrolled, is unrestricted as to "frequency of practice." The first answer to these arguments is that the Supreme Court has vested in it the power to regulate the practice of law in this state regardless of a statute. Ark. Const. (1874), Amendment 28. The next answer is that we held adversely to this contention in the recent case of *McKenzie v. Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973), where Cox was also the enrollee. There we said:

> When viewed in the light of the narrow question presented here, the statute constitutes little more than a recognition of the usual practice of permitting an attorney, licensed and in good standing in a sister state to appear

> and participate in the trial or argument of a particular case. The granting of such permission, without or even in spite of a statute, seems to be within the inherent power of the court, and is a rather general practice.

We further said:

> . . . [S]tatutes relating to the practice of law are merely in aid of, but do not supersede or detract from the power of the judicial department to define, regulate and control the practice of law, and that the legislative branch may not, in anyway, hinder, interfere with, restrict or frustrate the powers of the courts.

Appellant next asserts that even if the trial court had the authority to strike Cox's enrollment order, it grossly abused its discretion in doing so. Although this court has not exercised its inherent power by promulgating rules as to the practice of law in our state by nonresident attorneys, our local courts, in the absence of any rule by this court, certainly have the inherent authority to formulate reasonable rules and regulations which allow or prevent a nonresident attorney from practicing law in an Arkansas court. *McKenzie v. Burris, supra;* and *Letaw v. Smith, Chancellor*, 223 Ark. 638, 268 S.W.2d 3 (1954). The circumstances in each case might necessitate that the court "properly protect" a legitimate interest of the public as well as the individual litigants. In *McKenzie* we mention certain areas where a court may exercise its discretionary authority in considering pro hac vice admissions:

> The state has legitimate interests to be weighed in considering pro hac vice admissions in order to maintain a high level of professional ethics, to assure a high quality of representation in the courts and to protect the economic interests of the regularly licensed resident attorneys of the state. In order to properly protect these interests and to expedite the administration of justice, the courts are con-

> cerned with the qualifications and conduct of counsel, their availability for service of papers and amenability to disciplinary proceedings. But these interests do not justify an arbitrary numerical limitation on the number of such appearances by an attorney in the state, where the nonresident attorney associated with resident counsel is not involved in a general practice of law, particularly where the nonresident practitioner has developed some degree of expertise in the particular field of litigation in which he is engaged. (Citing cases.)

In the case at bar the petitioners had first consulted with a local law firm which has demonstrated expertise in tort actions. However, this being a medical malpractice case, the firm declined to represent petitioners and referred them to Cox, a Memphis attorney, who is acknowledged to possess an expertise in this particular phase of law. The referral of an individual to another attorney who has a greater expertise in a particular phase of the law is in keeping with the professional duty of an attorney to make competent legal counsel available to individuals. ABA Code of Professional Responsibility, Canon 2. Cox regularly represents plaintiffs, such as the petitioners, as well as members of the medical profession. Upon consulting with Cox, he accepted their case and, since the statute of limitations was about to run, personally prepared the complaint and delivered it for filing to a Little Rock attorney and associated him in the case. It is unquestioned, as recited in the court's enrollment order, that Cox is "a member in good standing of the bar of Tennessee. . . ."

In striking the exparte enrollment order, after an evidentiary hearing, the court did so stating: Cox's participation in Arkansas litigation is ever increasing; petitioner Brown employed Cox at his Memphis office; Cox dictated and had the complaint typed there and, since that statute of limitations was about to run, drove to Little Rock where he delivered the pleading to a local

attorney for filing; Cox, therefore, associated local counsel with him rather than being associated as co-counsel by local counsel as was done in *McKenzie, supra;* there Cox was enrolled as an associate of local counsel to assist them in all phases of trying the cause of action; such an entry in the present case would be substituting form for substances; Cox is practicing law in Arkansas without being licensed to do so; there are competent licensed attorneys in the state; Cox was currently connected with either four or six cases in Pulaski County, Cox tries lawsuits all over the United States and there is no doubt his commitments for trial in other jurisdictions would conflict with cases set for trial in Pulaski County; it is obvious to the court that numerous matters of procedure could not be cleared through a resident attorney because they would have to be cleared with Cox; concern about the availability of attorneys of record and the court's ability to know that such attorneys speak for all parties concerned with their phase of the case, in relationship to the orderly administration of the court; and Cox forwards files in medical malpractice cases to one Paula Stone, a lay person in another state, who, for a minimum fee of $500, contacts medical doctors and obtains from them evaluations of the cases and commitments to testify.

Respondents add that interrogatories in two local cases had not been answered by Cox or local counsel associated with him, although the interrogatories were filed in one case two years previously and about five months before the other local case. Cox's testimony is no request for immediate response or any time limit was set which would result in a request for a default judgment. He admits, however, that local counsel are relying upon him for the necessary work in answering the interrogatories. Further, he has "an extremely heavy trial load involving trials all over the country." He testified that he had represented fourteen cases in Arkansas, twelve or thirteen of which went to suit and six of which were in the circuit court of Pulaski County.

We agree with respondent that the burden is upon the petitioners to show that the granting of the motion to strike Cox's enrollment was an abuse of discretion. Indeed, that is a heavy burden. First we observe that the method of review before us, certiorari and mandamus, is not an issue. However, the law is well settled that upon review by certiorari it is essential that there be demonstrated a plain, manifest, clear, great or gross abuse of discretion by a trial court before an appellate court is justified in granting the relief sought. 14 Am. Jur. 2d 787, Certiorari § 10; 14 C.J.S. 174, Certiorari §30; 14 Am. Jur. 2d 796, Certiorari § 20; and 1 Bailey on Habeas Corpus 738, § 188 (1913). Cf. *State v. Nelson, Berry Pet. Co.*, 246 Ark. 210, 438 S.W.2d 33 (1969); and *Ark. State Highway Comm. v. Light, Judge*, 235 Ark. 808, 363 S.W.2d 134 (1962).

As to mandamus, in order to grant the relief sought by petitioners, it is essential for us to hold the trial court was guilty of such a gross abuse of discretion that it may be said to have been so arbitrary that it amounted to a refusal by the trial court to proceed. Otherwise, mandamus will not lie. *Edmondson v. Bourland*, 179 Ark. 975, 18 S.W.2d 1020 (1929). This view is widely held and so expressed by the text writers. 59 C.J.S., Mandamus, § 63. When the findings of the court, in the case at bar, are tested by the foregoing rules of law governing certiorari and mandamus, we cannot say the heavy burden was met by the petitioners.

There was a very substantial basis for the court's concern about the extent of Cox's practice in Arkansas, and elsewhere, and the potential effect of this extensive practice on the ability of the judge to control and expedite his docket as well as the progress of cases in which Cox participated without sacrificing the interest of litigants, witnesses and other participants in his court. We must accord the trial court the right to take into consideration the possibility that Cox might not be able to appear at trial, pre-trial unavailability, unavailability for discipline

in order to require him to answer interrogatories, his being unavailable or present to conduct a hearing on a motion, availability when depositions were scheduled, and that his nonavailability to any one of these instances would work a hardship on Arkansas residents in whose case he is enrolled as well as other residents of the state who have cases pending in the same court. We emphasize that comity is a courtesy and not a right.

Neither can we say that petitioners have been prejudiced since nothing is presented which indicates that the Bar of Arkansas is inadequate with respect to trial advocacy and, consequently, the participation of Cox, in the case at bar, is absolutely essential to adequate presentation of their claim.

The question is not what this court or any member of it would have held on the question or whether we think the court in the exercise of its sound discretion should have reached a different result. The question is whether the abuse of that discretion, if abused, is plain, clear, manifest, gross, great, or serious. This means that the abuse must be such that the action of the trial court was arbitrary and capricious, or at least that the error in the discretionary action is so apparent as to be without argument. We certainly cannot say on the record as a whole before us that the trial court grossly, arbitrarily and capriciously abused the discretionary authority which is properly accorded to him.

The case at bar, together with *McKenzie v. Burris, supra,* convinces us that the time has come when appropriate regulations should be promulgated concerning nonresident attorneys by comity. In this connection we invite suggestions from the bench and bar of the State of Arkansas.

Writs denied.

Brown, Jones and Byrd, J.J.J., dissent.

LAW OR CHANCERY MANDATE

State of Arkansas
In the Supreme Court } Sct.

Bt It Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 7th day, being the first Monday of October, A.D. 1974, amongst others were the following proceedings, to-wit:

On the 18th day of November, A.D. 1974, a day of said term

R. N. Brown, et ux.,
Appellant,
No. 74-36 v.
Warren E. Wood, Judge, et al.,
Appellee.
} Appeal from Pulaski Second Court District

This cause came on to be heard upon the Petition for Writ of Certiorari and Writ of Mandamus and the response thereto, and was argued by counsel; on consideration whereof it is the opinion of the Court that the Writs should be denied for the reasons set out in the opinion herein delivered.

It is therefore considered by the Court that the Petition for Writ of Certiorari and Writ of Mandamus be, and the same is hereby, denied.

It is further considered that said respondents recover of said petitioners all their costs in this Court, in this cause expended, and have execution thereof. Brown, Jones and Byrd, JJ., dissent.

In Testimony That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I Jimmy H. Hawkins, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 23rd day of December, A.D. 1974.

Jimmy H. Hawkins
Clerk

By Dona L. Williams
D.C.

PART OF APPENDIX A

State of Arkansas
In the Supreme Court } Sct.

Be It Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 7th day, being the first Monday of October, A.D. 1974, amongst others were the following proceedings, to-wit:

On the 23rd day of December, A.D. 1974, a day of said term

R. N. Brown, et ux.,
Appellant,
No. 74-36 v.
Warren E. Wood, Judge, et al.,
Appellee.

Appeal from .....
..... Court
..... District

Petition for rehearing is denied. Byrd, J., would grant the petition.

In Testimony, That the above is a true copy of the Per Curiam of said Supreme Court, rendered in the case therein stated, I,

Jimmy H. Hawkins, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 23rd day of December, A.D. 1974.

Jimmy H. Hawkins
Clerk

By Dona L. Williams
D.C.

APPENDIX B

Supreme Court of Arkansas

R. N. Brown, et ux,
Petitioners,

v.

Warren E. Wood, Judge, et al,
Respondents.

No. 74-36
Opinion Delivered
Dissent

Conley Byrd, Associate Justice

As I read the record in this case the lawyers representing Harold Chakales, M. D., were not attacking Mr. Cox's ability to represent his clients but were complaining because he was too successful in representing them and consequently complained that he had received $111,000 in fees from malpractice settlements or payments made one liability insurance company. I submit that Mr. Cox has appeared in no more lawsuits than did Justice Thurgood Marshall for litigants in this State and I have never heard anybody suggest that Thurgood Marshall was involved in the unauthorized practice of law. Furthermore, Wills Davis of Memphis, Tennessee, regularly appeared in litigation before the trial courts of this State and I never heard it contended that he was involved in the unauthorized practice of law. Thus in view of past history it appears to me that the trial court was arbitrary in refusing to permit Mr. Cox by comity from participating in the trial of this ligitiation.

It also appears to me that the preventing Mr. Cox from representing Mr. and Mrs. Brown in the malpractice action we are encouraging the trial courts to give more emphasis to the income protection of local lawyers than we are to the rights of the litigants. The record shows that after consulting with

legal counsel Mr. and Mrs. Brown were referred to the law firm of McMath and Woods. Ex-Governor McMath refused to take the case, not because of lack of merit, but because he had considerable business with Dr. Chakales. Henry Woods, Ex-Governor McMath's law partner and a former president of the Arkansas Bar Association, finally suggested to the Browns that they consult Mr. Cox, a Memphis, Tenn. lawyer. Since Mr. Cox, a specialist in medical malpractice, after consultation thought that Mr. and Mrs. Brown had a meritorious claim, I can only conclude that Mr. and Mrs. Brown have a meritorious cause of action that they are entitled to have submitted to a jury for a factual determination. Under these circumstances I challenge any member of the majority or the trial court to come forth with the name of any lawyer in Arkansas that has had any plaintiff success in the medical malpractice field in the trial courts and in persuading physicians and surgeons to break the so-called "conspiracy of silence." Had I been practicing law and had the Browns consulted me, I would have given them the same advice they got when they were referred to Mr. Cox. After all it would appear that the regulation of the practice of the law is for the benefit of the litigants not necessarily for the lawyers. If the regulation turns out in practice to be for only the benefit of the lawyers then we are subject to being chastized for operating a monopoly.

For the reasons stated, I respectfully dissent.

APPENDIX C

In the Circuit Court of Pulaski County, Arkansas

R. N. Brown, et ux, Plaintiffs.

v.

Dr. Harold Chakales, Defendant.

No. 83193

Memorandum Opinion

Defendant's motion, timely made, to strike the October 23rd, 1973 Order entering the name of James S. Cox, a nonresident attorney, as an attorney of record in this case is granted.

The reason for such action is hereinafter briefly set forth:

(1) Supplementing the record made in the *McKenzie-Burris* case, it was shown that Mr. Cox' participation in Arkansas litigation is ever increasing.

(2) Plaintiff Brown employed Mr. Cox through direct contact with him in his Memphis office. The conditions of such employment were agreed to and Mr. Cox dictated the complaint; had same typed; and, realizing that time was of the essence because of the Statute of Limitation, drove to Little Rock where the pleading was delivered to Mr. Camp for filing.

(3) Mr. Cox is in the position of having Mr. Camp associated with him rather than being asked to participate as an associate to Mr. Camp. In the McKenzie case, emphasis was placed on the proposition that Mr. Cox' name was entered of record "to be associated by Mobley and Smith * * * and to

assist in all phases of trying the herein cause of action." Such an entry in the present case would be substituting form for substance.

(4) Based upon the facts of this particular case, Mr. Cox is found to be practicing law in Arkansas without having been licensed to practice in this State.

It has been the custom and practice of this Court to welcome nonresident attorneys to be admitted for a particular case. Although this decision is limited to instant case the Court makes the following observations for the benefit of all members of the bar.

We have outstanding lawyers residing in Arkansas and duly licensed to practice in the State. Within the past two years Mr. Cox has received fees in excess of $111,000 from one insurance company alone as a result of his Arkansas related cases. It would be to the economic interest of Arkansas lawyers to carefully scrutinize the extensive work of Mr. Cox in this State.

Mr. Cox is presently connected with either four or six cases pending in Pulaski County. He tries lawsuits all over the United States and no doubt his commitments for trials in other jurisdictions would conflict with the cases set for trial in Pulaski County.

Mr. Cox forwards his file on alleged malpractice cases to Philadelphia for the attention of Paula Stone. What all she does may be unknown but she charges a minimum of five hundred dollars per case for her services. It is known that Paula Stone contacts a/or several medical doctors in that area for the purpose of having said doctor or doctors evaluate the case and express a willingness to testify in the matter.

It appears quite obvious to the Court that no interrogatories, no request for admission, no pre-trial conferences and other matters of procedure could ever be cleared through a resident

attorney because such matters would have to be cleared with Mr. Cox. In the administration of this Court, a Judge is naturally concerned with the availability of attorneys of record and with the knowledge that such attorneys can speak for all parties connected with their phase of the case.

As above suggested, this opinion is confined to the Chakales case, but the Court feels it is only fair to point out that in each instance where Mr. Cox' name is presented to the Court for enrollment in a particular case, such petition will be scrutinized in the light of comments made above and subsequent evidence presented.

The original of this Memorandum Opinion is being filed in the office of the Circuit Clerk of Pulaski County, Arkansas, to be made a part of the record in the event of appeal.

/s/ Warren Wood
Circuit Judge

January 14, 1974

APPENDIX D

Arkansas Nonresident Attorney Statutes, Ark. Stats. Ann. § 25-108, et Seq. (1955)

25-108. Nonresident attorneys—Right to practice.—Nonresident attorneys at law of record shall be allowed to practice law in all the courts of this state of equal jurisdiction of the court or courts to which they have been admitted to practice and are members of the bar in good standing in the state of their residence under such terms and conditions and requirements as may be prescribed by the rules of practice of any court in which any such nonresident attorney at law seeks to practice. [Acts 1911, No. 222, § 1, p. 200; C. & M. Dig., § 603; Pope's Dig., § 643; Acts 1955, No. 322, § 1, p. 710.]

25-109. Enrollment of nonresident attorneys—Rights and privileges.—It shall be the duty of the justice of the peace or the clerk of the court in which a nonresident attorney at law may have professional business as an attorney in representing either a resident or a nonresident client upon the request of said nonresident attorney with satisfactory proof of his being a member of the bar in good standing in the state of his residence of a court or courts of equal jurisdiction of the court in this state to which he is applying for admission to practice, to enroll said attorney at law as a member of the bar of said court, and, when so enrolled, said nonresident attorney at law shall be vested with all the rights and privileges of resident attorneys at law in said court, except that a nonresident attorney at law shall not be allowed to become a bondsman for a client in this state. [Acts 1911, No. 222, § 2, p. 200; C. & M. Dig., § 604; Pope's Dig., § 644.]

25-110. Record of enrolled nonresident attorneys—Registry fee.—Justices of the peace and clerks of all courts of record

shall keep, in a well bound book, a record of all nonresident attorneys at law enrolled in their courts under this act [§§ 25-108–25-111] and shall be allowed a fee of one dollar [$1.00] for each nonresident attorney so enrolled, to be paid by the applicant for enrollment. [Acts 1911, No. 222, § 3, p. 300; C. & M. Dig., § 605; Pope's Dig., § 645.]

APPENDIX E

Pertinent Portions of Note: The Practice of Law by Out-of-State Attorneys, 20 Vand. L. Rev. 1276

Parallel logic would suggest that substantive due process would be denied a client where necessary representation by foreign counsel is refused, in that the client is thus effectively prevented from enforeing his rights. A third source made significant by similar reasoning might be the right to effective representation by counsel,[71] guaranteed by the sixth and fourteenth amendments.

One difficulty with these approaches, however, may severely restrict their application, for each is premised on an ability to prove the inadequacy of local counsel. In civil rights or other unpopular defendant cases, local antipathy might be so extreme as to make representation by foreign counsel a necessity. In highly specialized areas of the law, where only foreign counsel were truly qualified to provide effective representation, one of these theories might also be helpful.

A further alternative to the client seeking representation by foreign counsel is to insist that the right to counsel guarantees a right to counsel of one's own choosing.[72] This is much broader than the right to effective counsel, and if given effect, would do much toward eliminating state barriers to the interstate practice of law. In the 1950 case of *Cooper v. Hutchison*,[73] the United States Court of Appeals for the Third Circuit considered the argument. Counsel based their plea on *United States v. Bergamo*,[74] in which the same court had found a sixth amendment right to counsel of one's own choice in federal criminal prosecutions.[75] They urged[76] that, since their client had been tried for a capital crime in a state court, the Supreme Court's ruling in *Powell v. Alabama*[77] should grant him the same right

to choose foreign counsel in a state prosecution as *Bergamo* granted in a federal trial. The Third Circuit did in fact permit the foreign attorney to practice as of right; but it do so on other grounds,[78] stating further that *Bergamo* was "not conclusive" since it only established qualifications for trials in the Third Circuit.[79]

With the 1963 extension, in *Gideon v. Wainwright*,[80] of the right to counsel in all state felony prosecution, application of the *Bergamo* interpretation would permit foreign attorneys to practice as of right in any state or federal criminal prosecution. Indeed, this might not be an undesirable circumstance. In at least one case[81] since *Gideon* the issue has presented itself. There, a foreign attorney selected by the defendant was permitted to represent him in a capital prosecution without association of local counsel as required by rule of court. However, the challenge was raised not by the state, but by the defendant himself subsequent to his conviction. The court avoided the issue by ruling that the defendant had "waived the right, if any he had"[82] to local counsel.

These alternative theories under federal law to enable a foreign attorney to appear as of right in state litigation are especially significant in light of two recent Supreme Court decisions—*NAACP v. Button*[83] and *Brotherhood of Railroad Trainmen v. Virginia*.[84] These two cases upset the balance of policies formerly in favor of state control of the bar, and emphasize instead the constitutional rights of individuals.

> A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest.[85]

In each case, the Court looked first to the constitutional right protected,[86] and then shifted the burden of proof to the state

"to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed."[57]

(*Footnotes Omitted*)